No. 17-1091

IN THE

# Supreme Court of the United States

TYSON TIMBS AND A 2012 LAND ROVER LR2,
*Petitioners,*

v.

STATE OF INDIANA,
*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of Indiana**

## BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

Whether the Eighth Amendment's Excessive Fines Clause is incorporated against the States under the Fourteenth Amendment.

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## INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct, in both state and federal court. NACDL was founded in 1958, and has a nationwide membership of many thousands of direct members, and up to 40,000 members when affiliates are included. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. It is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files its brief in this case because of its great importance to criminal defendants throughout all fifty states, many of whom currently have no redress under the Constitution for what are by definition gross and disproportionate abuses of the state's power to levy fines.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The entitlement to be free from excessive fines is a fundamental right that predates and undergirds both the Eighth and the Fourteenth Amendments. The legal pedigree of this principle as a judicially enforceable right can be traced from the Eighth Amendment

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[1] The parties have given blanket consent to the filing of amicus briefs in this matter and have received notice of NACDL's intent to file this brief. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

and its state analogues through Blackstone and the English Bill of Rights to the signing of Magna Carta in 1215.

For the founders, the principles of moderation and proportionality embodied in this guarantee were not only a matter of plain justice and fundamental right, they were also necessary for the maintenance of a free and civilized society. This was because the founders (rightly) believed that excessive punishment not only injured the aggrieved person, but also coarsened society as a whole. As Montesquieu explained, "where men are deterred only by cruel punishments, we may be sure that this must, in a great measure, arise from the violence of the government which has used such penalties for slight transgressions." Montesquieu, *Spirit of Laws*, bk.6, ch. 12 (1748); see also Thomas Jefferson, A Bill for Proportioning Crimes and Punishments (1778); James Wilson, *Lectures on Law* (1804), reprinted in 1 James Wilson, *Collected Works of James Wilson* 348 (Kermit L. Hall & Mark David Hall, eds., Liberty Fund 2007). By codifying this principle in the Constitution, moreover, the framers ensured that judges would be able to serve as a necessary check on harsh legislation and overzealous prosecution.

This case presents a single question: does this fundamental guarantee apply to the States through the Fourteenth Amendment? The Indiana Supreme Court below said "no," acknowledging that it was deepening a split of authority that would ultimately have to be addressed by this Court. Like the other state courts that have held that the Excessive Fines Clause does not apply to the states, however, the Indiana Supreme Court's decision was not based on an analysis of the meaning of the Constitution or this Court's incorporation jurisprudence. Instead, it

grounded its conclusion on a single fact: that this Court had not yet "definitively decided" the question.

This is a troubling development. The Constitution is "the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. It is therefore incumbent upon both state and federal courts to fully and fairly consider the merits of a party's constitutional arguments, not merely to look to see whether this Court has binding precedent on point. As Justice Story explained more than 200 years ago:

> It is obvious that this obligation is imperative upon the state judges . . . . From the very nature of their judicial duties, they [are] called upon to pronounce the law applicable to the case in judgment.

*Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 340 (1816).

For people like Timbs, the consequences of such unreasoned decisions are profound. Indeed, in an era where onerous fines are increasingly levied by states through the constitutionally dubious rubric of civil asset forfeiture, the federal Constitution's prohibition on excessive fines is now more important than ever.

This case thus presents matters of great doctrinal and practical importance, and as explained by Petitioner, it is an excellent vehicle, meeting all of the requirements for "cert.-worthiness."

## ARGUMENT

### I. IN REFUSING TO ANALYZE WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO THE STATES, THE INDIANA SUPREME COURT IGNORED ITS OBLIGATION TO ENFORCE THE U.S. CONSTITUTION.

The Indiana Supreme Court's refusal to consider the merits of Timbs' Eighth Amendment claim absent a clear holding from this Court is incompatible with that charter's status as "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Indeed, it is a failure to comply with the fundamental judicial duty "not only to give judgment but to expound law." Philip Hamburger, *Law and Judicial Duty* 614 (2008); see also *Tyler* v. *Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 707 (6th Cir. 2016) (en banc) (Batchelder, J., concurring in most of the judgment) (Judges are bound by their "oath to uphold and defend the Constitution, and [they] must therefore show restraint when that document restrains [them] and be active when it commands action. [They] must, in other words, say 'what the law is.'").

That the Indiana Supreme Court is a creature of state, rather than federal, law is no excuse. As Alexander Hamilton explained, under the federal Constitution, "the national and State [court] systems are to be regarded as one whole." The Federalist No. 82, at 494 (Alexander Hamilton) (Clinton Rossiter ed., 1961); see also *Claflin* v. *Houseman*, 93 U.S. 130, 136–37 (1876) (state courts have concurrent jurisdiction over claims arising under the federal Constitution when Congress has not bestowed exclusive jurisdiction on federal courts). And state courts are thus "not to decide merely according to the laws or constitution of the state, but according to the constitution, laws and treaties of the United States." *Martin*,

14 U.S. (1 Wheat.) at 340–41; see also Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 489 (1954) ("The law which governs daily living in the United States is a single system of law."). "From the very nature of their judicial duties," state judges, like their federal colleagues, are "called upon to pronounce the law applicable to the case in judgment." *Martin*, 14 U.S. (1 Wheat.) at 340.

Thus, "in the exercise of their ordinary jurisdiction, state courts" hear "cases arising under the [C]onstitution," and must therefore interpret the Constitution in those cases just as federal courts would. See *id.* at 342; see also Hart, *supra*, at 507 ("The supremacy clause, of course, makes plain that if a state court undertakes to adjudicate a controversy it must do so in accordance with whatever federal law is applicable."). "State courts ordinarily fulfil such obligations without question." *Hart*, *supra*, at 516. For otherwise, the Supremacy Clause "would be without meaning or effect, and public mischiefs, of a most enormous magnitude, would inevitably ensue." *Martin*, 14 U.S. (1 Wheat.) at 342.

This is hardly a rare occurrence: state courts frequently handle claims involving federal constitutional law, especially in the criminal context. This includes, for instance, applications of the Fourth Amendment, such as determining whether searches or seizures were reasonable, see, *e.g.*, *Utah* v. *Strieff*, 136 S. Ct. 2056, 2064 (2016) (reversing judgment of the Utah Supreme Court that evidence was inadmissible under the Fourth Amendment); the Fifth Amendment, such as with issues of self-incrimination and double jeopardy, see, *e.g.*, *Evans* v. *Michigan*, 568 U.S. 313, 330 (2013) (reversing judgment of the Supreme Court of Michigan in a case involving the

Double Jeopardy Clause of Fifth Amendment); the Sixth Amendment, such as matters considering the rights to counsel, speedy trial, and confrontation, see, *e.g.*, *Peña-Rodriguez* v. *Colorado*, 137 S. Ct. 855, 871 (2017) (reversing and remanding a case involving interpretation of the Sixth Amendment "fair trial" right to the Supreme Court of Colorado); the Eighth Amendment, such as issues turning on whether there was excessive bail or a cruel and unusual punishment, see, *e.g.*, *Moore* v. *Texas*, 137 S. Ct. 1039, 1053 (2017) (vacating judgment and remanding a case involving application of the Eighth Amendment to the Texas Court of Criminal Appeals); and even Fourteenth Amendment due process claims, see, *e.g.*, *Nelson* v. *Colorado*, 137 S. Ct. 1249, 1258 (2017) (reversing, finding that Colorado's Exoneration Act violated the Fourteenth Amendment, and remanding to the Colorado Supreme Court). In these and many other areas, criminal defendants depend upon state judges to give serious attention to the constitutional arguments raised by counsel, regardless of whether this Court has spoken to that particular issue, and regardless of whether it is an easy or difficult question. Criminal defendants, moreover, do not get to decide whether they are prosecuted in state or federal court. There is, for example, no right of removal for a defendant facing charges in state court.

The importance of state courts' fully considering a criminal defendant's claims can be seen in how deferential federal courts are to state court decisions when considering federal habeas corpus petitions. A federal court can grant an application for a writ of habeas corpus only if the state decision was "contrary to, or involved an unreasonable application of, clearly established Federal law," or if the decision "was based on an unreasonable determination of the facts."

28 U.S.C. § 2254(d). This deference assumes that the "considered conclusions of a coequal state judiciary" deserve "great weight" from the federal courts. *Miller* v. *Fenton*, 474 U.S. 104, 112 (1985). Thus, "federal courts are not to run roughshod over the considered findings and judgments of the state courts that conducted the original trial and heard the initial appeals." *Williams* v. *Taylor*, 529 U.S. 362, 383 (2000). They must instead "attend closely to those considered decisions, and give them full effect when their findings and judgments are consistent with federal law." *Id.* In other words, federal courts assume that state courts are engaging in the same endeavor as they are in interpreting and applying the Constitution. As this reasoning indicates, when state courts refuse to fully consider constitutional claims raised in good faith, it is criminal defendants who suffer. See, *e.g.*, *Lafler* v. *Cooper*, 566 U.S. 156, 173 (2012) (finding that state court "identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it," and that federal courts could thus grant relief to defendant).

This case illustrates these concerns. The Indiana Supreme Court gave no attention to the underlying constitutional issue, concluding instead that the wiser course of action was simply to "decline to find or assume incorporation until the Supreme Court decides the issue." Opinion — On Petition to Transfer from the Indiana Court of Appeals at 5, *State* v. *Tyson Timbs*, No. 27S04-1702-MI-70 (Ind. Nov. 2, 2017). It gave only two, conclusory reasons for this decision. First, it read this Court's acknowledgement that it had "never decided whether the . . . Eighth Amendment's prohibition of excessive fines applies to the States through the Due Process Clause" as somehow indicating that this guarantee did not apply to the

states. *Id.* at 4-5 (quoting *McDonald* v. *City of Chicago*, 561 U.S. 742, 745 n.13 (2010)). And second, it "elect[ed] not to impose federal obligations on the State," to avoid adopting "a *federal* test that may operate to impede development of [Indiana's] own excessive-fines jurisprudence." *Id.* at 6.

But nothing in this Court's jurisprudence suggests that *McDonald* can be fairly read as indicating that this Court has concluded that the Excessive Fines Clause is inapplicable to the states—quite the opposite is the case. See, *e.g.*, *Hall* v. *Florida*, 134 S. Ct. 1986, 1992 (2014) (stating that the Eighth Amendment's prohibition on excessive bail, on excessive fines, and on cruel and unusual applies to the states). And it is odd to say that a state court's *refusal* to exercise its independent role as an expositor of the federal Constitution somehow serves the interests of federalism.

Unfortunately, Indiana is not alone in this approach. Other state courts examining the Excessive Fines Clause have done much the same, assuming either the guarantee has or has not been incorporated without extended discussion. See, *e.g.*, *Pennsylvania* v. *1997 Chevrolet*, 160 A.3d 153, 162 n.7 (Pa. 2017) (assuming Excessive Fines Clause applied); *Pub. Emp. Ret. Admin. Comm'n* v. *Bettencourt*, 47 N.E.3d 667, 672 n.7 (Mass. 2016) (same); *People ex rel. Lockyer* v. *R.J. Reynolds Tobacco Co.*, 124 P.3d 408, 420 (Cal. 2005), *as modified* (Jan. 18, 2006) (same); *Ex parte Kelley*, 766 So. 2d 837, 840 (Ala. 1999) (same); *People ex rel. Waller* v. *1989 Ford F350 Truck*, 642 N.E.2d 460, 464–65, 467 (Ill. 1994) (same). Even federal courts have done so. See, *e.g.*, *Hamilton* v. *City of New Albany, Indiana*, 698 F. App'x 821, 827 (7th Cir. 2017) (assuming Excessive Fines Clause applied); *Cripps* v. *La. Dep't of Agric. and Forestry*,

819 F.3d 221, 234 (5th Cir. 2016), *cert. denied*, 137 S. Ct. 305 (2016) (same); *Discount Inn, Inc.*, v. *City of Chicago*, 803 F.3d 317, 320 (7th Cir. 2015) (same); *Qwest Corp.* v. *Minn. Pub. Utils. Comm'n*, 427 F.3d 1061, 1069 (8th Cir. 2005) (same); *Wright* v. *Riveland*, 219 F.3d 905, 915 (9th Cir. 2000) (same).

The time is therefore ripe for this matter to be considered, and for this Court to give guidance not only on the substance of the Constitution, but also on lower courts' obligations to interpret and apply it.

## II. THE ABUSE OF CIVIL ASSET FORFEITURE BY STATES LIKE INDIANA UNDERSCORES THE PRACTICAL IMPORTANCE OF THIS CASE.

Time has not laid to rest the founding-era fears of excessive fines. Indeed, the rise of civil asset forfeiture—the origin of the fine in this case—has made the issue more important than ever. As Justice Thomas recently pointed out, aggressive use of forfeiture proceedings has in recent decades become a favorite means of levying fines and is a practice that is often oppressive, unfair, and constitutionally dubious in its own right. *Leonard* v. *Texas*, 137 S. Ct. 847 (2017) (Thomas, J., statement respecting the denial of certiorari); see also *Forfeiture Reform*, Nat'l Ass'n of Criminal Defense Lawyers (2017), https://www.nacdl.org/forfeiture/. (Forfeiture "represents one of the most fundamental threats to the individual liberties of those accused of criminal activities as well as citizens not charged with any crime . . . . [It] tears at the heart of justice and fairness in our system.").

Law enforcement and prosecutors typically defend asset forfeiture as providing a necessary supplement to their bottom line. But whatever the merits of this

argument might be in the abstract, even a brief overview of current forfeiture practice demonstrates just how far out of hand things have gotten in practice.

To begin with, the system has created perverse incentives for law enforcement that have become internalized in the way police and prosecutors think and talk about forfeiture. Consider, for example, the remarkably candid exchange at a recent Columbia, Missouri Citizens Police Review Board meeting on the issue:

> **Board Member Daniel K. Jacob:** "How do you decide forfeiture funds?"
>
> **Police Chief Ken Burton:** "You know, it's usually based on a need. Well, I take that back. . . . Yeah, it's—there's some limitations on it. You know, it's, um, actually there's not really on the forfeiture stuff. It's just—we just usually base it on something that **would be nice to have**, that we can't get in the budget, for instance. Though, y'know, we try not to use it for things that we need to depend on, y'know, 'cause we need to go ahead and have those purchased, but it's kind of like **pennies from heaven**, y'know, it **gets you a toy or something that you need**, is the way we typically look at it."[2]

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[2] LastWeek Tonight, *Civil Forfeiture: Last Week Tonight with John Oliver (HBO)*, YouTube (Oct. 5, 2014), https://youtu.be/3kEpZWGgJks?t=537 (emphases added); see also Citizens Police Review Board Minutes (Nov. 14, 2012), http://www.como.gov/Council/Commissions/downloadfile.php?id=7548&bcid=14; Heart Beat Staff, *'PENNIES FROM HEAVEN': CoMo Police Chief's Remarks Raise Nationwide Hackles*, The Columbia Heart Beat (Oct. 7, 2014), http://www.columbiaheartbeat.com/index.php/crime/932-100714.

Such "toys," moreover, often have little to do with the legitimate work of law enforcement. To pick an extreme example, a recent investigation by the Massachusetts state auditor discovered that the district attorney's office had used forfeiture funds to purchase a *Zamboni machine*, dryly adding that she "could not determine . . . the law-enforcement purpose it serves" or even where it was located.[3]

Such chicanery does not serve any legitimate law-enforcement interest. But the cost to ordinary citizens, by contrast, is very real. Consider the experience of New Jersey resident George Reby. While driving through Tennessee on his way to purchase a vehicle in cash, he was pulled over by police—after he consented to a search, the officer took all $22,000 on the theory that "common people do not carry this much U.S. currency," and Reby must have been on his way to facilitate drug trafficking. Despite Reby's protestations and offers to show his bid on the vehicle, and despite prosecutors never charging Reby with a crime, and despite the officer admitting that he didn't know why he didn't credit Reby's defense, the officer confiscated the cash anyway. *Civil Forfeiture: Last Week Tonight with John Oliver*. "Luckily for [Reby], he was able to pursue the case with the help of an attorney." *Id.* Many others, however, are not so fortunate.

Members of Congress and the courts have often expressed concern about the government's sharp practices in this area. See, *e.g.*, *Federal Asset Forfeiture: Uses and Reforms: Hearing Before the Subcomm. on*

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[3] Commonwealth of Mass. Office of the State Auditor Suzanne M. Bump, Official Audit Report-Issued Feb. 15, 2013 (2013), https://www.mass.gov/files/documents/2016/08/ws/201212623j.pdf.

*Crime, Terrorism, Homeland Security, and Investigations of the H. Comm. on the Judiciary*, 114th Cong. 1, 3 (2015) (statement of Rep. James Sensenbrenner, Chairman, Subcomm. on Crime, Terrorism, Homeland Security, and Investigations) ("It is hard to believe this can happen in America. The Government is seizing billions of dollars of cash and property from Americans, often without charging them with a crime. . . . It is no wonder why my former colleague, Henry Hyde, described civil asset forfeiture as 'an unrelenting Government assault on property rights, fueled by a dangerous and emotional vigilante mentality that sanctions shredding the U.S. Constitution into meaningless confetti.'"); *United States* v. *James Daniel Good Real Prop.*, 510 U.S. 43, 81 (1993) (Thomas, J., concurring in part and dissenting in part) ("[L]ike the majority, I am disturbed by the breadth of new civil forfeiture statutes such as 21 U.S.C. § 881(a)(7), which subjects to forfeiture *all* real property that is used, or intended to be used, in the commission, or even the *facilitation*, of a federal drug offense."); *United States* v. *All Assets of Statewide Auto Parts*, 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormously troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes."); *State* v. *Timbs*, 62 N.E.3d 472, 478 (Ind. Ct. App. 2016) (Barnes, J., dissenting), *rev'd*, 84 N.E.3d 1179 (discussing "the overreach some law enforcement agencies have exercised in some of these cases. Entire family farms are sometimes forfeited based on one family member's conduct, or exorbitant amounts of money are seized."). But despite these concerns, both Congress and the courts have been largely unwilling or unable to place any meaningful constraints on this practice.

The protection of the Excessive Fines Clause is one of the few exceptions. See *Austin* v. *United States*, 509 U.S. 602, 622 (1993). But it remains only a paper barrier in those states that have refused to give it effect. This petition is a case in point. Timbs' crime was of a relatively minor nature—a class D felony arising out of a minor drug-dealing incident—and the trial court's sentence was lenient: one year of home detention followed by five years of probation and roughly $1,000 in court costs. The forfeiture of Timbs' Land Rover—prosecuted before a civil tribunal by a private lawyer working on a contingency fee basis—was by contrast very harsh as the vehicle was worth approximately four times the maximum criminal penalty. See Petition Appendix 20-21, 30 at ¶ 9, *Timbs* v. *Indiana*, No. 17-1091 (Jan. 31, 2018). Incorporation of the Eighth Amendment is needed to provide at least one critical and constitutional check on such government overreach.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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